



## APPENDIX A.

New York Civil Practice Act, §53, governing causes in equity (*Hanover v. Morse*, 270 N. Y. 86 at 89), provided in 1928, and still provides that:

“An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues.”

Where the equity cause arises out of an actual fraud, the accrual of the cause of action is postponed until the fraud's discovery. (*Hanover v. Morse*, 270 N. Y. 86 at 91).

In 1928 New York Civil Practice Act, §48 prescribed a limitation of six years in:

“1. An action upon a contract obligation or liability express or implied \* \* \*.”

. . . . .

“3. An action to recover damages for an injury to property \* \* \*.”

. . . . .

“5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.”



FILED  
SEP 16 1942

CHARLES E. EMMETT, CLERK

IN THE

# Supreme Court of the United States

October Term, 1942.

No. 404

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-  
Executors under the Last Will of Albert B. Shultz,  
Deceased,

*Petitioners,*

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,  
Individually and as Co-Executor under the Last Will  
of Albert B. Shultz, Deceased, *et al.*,

*Respondents.*

PRINCIPAL EXHIBITS REFERRED TO IN PETITION  
FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

ELLSWORTH C. ALVORD,  
JULES C. RANDAL,  
*Petitioners' Counsel.*



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This pamphlet contains copies printed for the court's convenience of those original exhibits (duly filed with the clerk of this court pursuant to order of Hon. Harold P. Burke, D. J.) deemed essential to passing on this petition. These exhibits are submitted in chronological order. A numerical index follows:

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**[Plaintiffs'] Exhibit P-54.\***  
(Received in evidence 11/15/40)

July 23—1928

Mr. George Rea  
Manufacturers & Traders Peoples Trust Co.  
Buffalo, N. Y.

My dear George:

Following our telephone conversation on Friday, I talked to my people in Detroit and find a very definite interest in the Houde Engineering Company.

I had expected to come to Buffalo tomorrow with the President of the interested company, but find that he will be out of town until the end of this week.

I agree with you entirely that it will be much more satisfactory at this stage for you to sound out this situation rather than bring in Eastman, Dillon & Co. or the potential purchaser direct. For a number of reasons which I have not explained to you, I believe that there may be an opportunity to work out something here which would be very profitable to both companies.

As I may have told you over the telephone, if a purchase were consummated of the Houde Engineering Co., other negotiations which the Detroit Company has under way at the present time would result in a substantial piece of financing, and we would naturally talk to you people about it.

If you have a recent balance sheet of the Houde Co. which you can conveniently send to me, I would appreciate it. Later in the week I will advise you when I expect to be in Buffalo.

With kind regards, I am

Yours very truly,

GNB:S

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\* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-54 on depositions herein.

**[Plaintiffs'] Exhibit P-520.\***  
 (Received in evidence 11/16/40)

MANUFACTURERS & TRADERS—PEOPLES TRUST COMPANY  
 Buffalo, New York

July  
 26th, 1928

Mr. George N. Buffington,  
 Eastman Dillon and Company,  
 Chicago, Illinois.

My dear George:

Thank you very much for your letter this morning. Its contents are certainly interesting, and I sincerely hope that our mutual efforts may result in successful negotiations.

As I told you over the telephone, I am perfectly sure that everybodys interests are best served by allowing us to make the approach to the Houde Company, and that in view of our other negotiations of three months ago, and the hope that we have for further negotiations at the end of this year on the part of yourself, George Courtelyou, and ourselves, I think it would be very bad to go off half-cocked and talk with them unless every evidence of serious interest was demonstrated on the part of a possible purchaser.

Every dream that the owners of the company had six months ago for the consummation of a very profitable operation has been exceeded. It is stated that their profits will run at the rate of \$1,500,000 a year, and this is very distinctly evidenced by their current large reductions in their bank loans to us.

I have evidences of the fact that the minds of the principal owners are still working along the line as when you and I last talked to them; namely that some sort of a sell out and enjoyment of some of their earned principal while they are still young enough to enjoy it appeals to them strongly, and I am quite certain in view of the last months' experience, however, that their ideas of price are apt to be

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\* Bears exhibit mark in previous litigation; carbon is Ex. P-55 for identification.

substantially larger than when we talked with them before. This is, of course, quite proper, as they have demonstrated the truth and soundness of their guess at that time.

I am sorry not to comply with your request for a recent balance sheet. They make no public statements, as you know, and though we are in touch with their figures constantly, it seems to me that it would not be ethical to turn over to anyone such figures as we have through our banking connection without their consent.

I should think that the plan of procedure should more properly be carried out as to first having the talk here in Buffalo with the President of the Detroit company, and yourself, and then for us to attempt to get a definite price, or option, and thereafter disclose the name of a possible purchaser with the privilege and necessity of showing to them as complete figures as we did in the previous negotiations.

It is awfully nice to be in touch with you again, and I shall look forward to hearing from you when your plans have progressed.

With very best regards, and assuring you of a welcome in Buffalo at any time, I am

Sincerely yours,

GEORGE P. REA

GPR:GW

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**[Defendants'] Exhibit P-56.\***

(Received in evidence 11/19/40)

July 27—1928

Mr. George Rea  
Manufacturers & Traders Peoples Trust Co.  
Buffalo, N. Y.

My dear George:

I received your letter of July 26th this morning regarding the Houde Company, and entirely agree with you that

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\* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-56 on depositions herein.

our interest can be best served by allowing you to approach Mr. Schultz.

I expect to talk to my people in Detroit on the telephone tomorrow, to see if it will be possible to arrange a meeting in Buffalo the early part of next week. I can assure you that this is more than a passing interest with my friends, but I, of course, do not know how far he would go with Mr. Schultz, if he is projecting his ideas of price entirely on the last three months earnings. However, I am convinced that this is a situation which warrants further discussion by the principals.

With kind personal regards, I am  
Yours very truly,

GNB:S

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**[Defendants'] Exhibit P-57.\***  
(Received in evidence 11/19/40)

Letterhead of  
MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY  
Buffalo, New York

August 13th, 1928

Mr. George Buffington  
Eastman, Dillon and Company  
Chicago, Illinois.

Dear George:

Have had a preliminary conversation this morning with Mr. Schultz and find that his attitude is, in general, as I reported it to you. I do not think there is any question but what a cash offer of a price that seems reasonable to him could purchase the business in that manner.

Mr. Chisholm is away until Labor Day, and was not at the meeting this morning, and as the conversation developed it seemed to me bad psychology to crowd him to the point of definitely talking price, or option, in this first con-

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\* Bears exhibit mark in previous litigation, identified on 4/3/40 as Ex. P-57 on depositions herein.

versation. I had hoped that in our very first talk we might have reached this point, but, as I say, as the conversation developed I felt it best to go a little slow.

Mr. Chisholm's absence is not going to be a factor, because he can be brought back to Buffalo, if necessary, but I am sure he will agree to anything that Schultz agrees to.

I am leaving my office within a few minutes, going to the hospital to have my tonsils out, which will lay me up for a few days, and I hope not longer than that. Immediately upon my return it was left that Mr. Schultz would come down to the bank for luncheon, and give me an opportunity to at that time talk definitely with him as to an option, and as to a definite price.

You inquired about the Spicer Mfg. Company. They are making Houde instruments at the present time for Ford, and have discussed informally with Schultz his attitude and reaction toward a possible merger of the two companies. This is not in any stage where it is a matter of concern to us, and I am sure that nothing of this sort could possibly take place to upset our plans.

You will hear from me again as soon as I have anything further to report.

With very best regards.

Sincerely,

GEORGE

GPR:GW

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**[Defendants'] Exhibit P-58.\***

(Received in evidence 11/19/40)

August 17—1928

Mr. George Rea  
Manufacturers & Traders Peoples Trust Co.  
Buffalo, N. Y.

My dear George,

I was sorry to hear that you have been laid up but know

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\* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-58 on depositions herein.

that you will feel much better, now that you have had your tonsils removed.

I was very glad to know that you were able to find time to see Mr. Shultz, and I will appreciate it very much if you will advise me immediately as the matter develops further.

Looking forward to an opportunity of seeing you again in the very near future, I am

Yours very truly,

GNB:S

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**[Defendants'] Exhibit P-59.\***  
(Received in evidence 11/19/40)

August 31, 1928

Mr. George Rea  
Manufacturers & Traders Peoples Trust Co.  
Buffalo, New York

My dear George:

Following my telephone conversation with you a week ago Friday, I talked with Mr. Glover again, and he seems quite anxious to have certain information which I have been unable to give him, regarding the Houde Engineering Company.

As I told you when I originally talked to you, they have one or two other plans in mind on which they are working, and Mr. Glover intimated to me that one situation had progressed to a point where they would have to make a decision in the near future. I appreciate fully the way you have handled the matter to this point and realize the wisdom in not appearing anxious with Mr. Schultz, but I do believe that if possible we should be in a position to discuss something quite definite with Mr. Glover within the next week or ten days, if we expect him to become actively interested in acquiring the business.

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\* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-59 on depositions herein.

I am merely bringing this to your attention to keep you posted upon my negotiations with the people in Detroit to date.

With kind regards, I am

Yours very truly,

GNB :S

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**[Defendants'] Exhibit P-60.\***

(Received in evidence 11/19/40)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY

Buffalo, New York

September 4th, 1928

Mr. George Buffington

Eastman, Dillon and Company

Chicago, Illinois

Dear George:

Thank you very much for your letter today. I appreciate exactly your position with Mr. Glover, and we are moving to a definite point with Schultz just as fast as we can.

I had already tried this morning, before your letter came, for an appointment with him this afternoon, only to find that they were not back yet, but expected tomorrow. I have to be in New York tomorrow, but that should mean that we should be able to consummate another appointment not later than Thursday, or Friday.

I shall report again the moment that there is something to say.

With very kind regards.

Sincerely,

GEORGE

GPR :GW

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\* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-60 on depositions herein.



**[Defendants'] Exhibit P-61.\***  
(Received in evidence 11/19/40)

Letterhead of  
MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY  
Buffalo, New York

September 4th, 1928

Mr. George Buffington  
Eastman, Dillon and Company  
Chicago, Illinois

Dear George:

Since writing you this morning I got in touch with Mr. Schultz, who refuses to do anything without consultation with Mr. Chisholm. Mr. Chisholm it now seems is not going to be here until sometime Thursday. Also Mr. Schultz has suddenly decided to take a month's vacation in Europe, and leaves for that purpose Thursday night.

We have urged Mr. Schultz strongly in every way that we could think of to get in touch with Mr. Chisholm by wire, or by telephone, so that we could function, but this he flatly refuses to do, and says that he will not discuss a definite option, or a definite price with us until he has had a chance to sit down and calmly talk it over with Mr. Chisholm.

We are going to make every effort to get them together on Thursday, and it is conceivable that we will be successful. We shall do everything possible, but it is a very bad break, and may, of course, mean the impossibility of a definite option for another month.

I shall report to you by telephone on Friday.

Sincerely yours,

GEORGE

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\* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-61 on depositions herein.

**[Defendants'] Exhibit P-62.\***

(Received in evidence 11/19/40)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY  
Buffalo, New York

September 6th, 1928

Mr. George Buffington  
Eastman, Dillon and Company  
Chicago, Illinois

Dear George:

I tried to wire you this afternoon about 4:30 over your wire; also tried to telephone you at your Chicago office, but found you had gone for the day. It is true that things are not very busy, but I wish I had a plutocratic 4:30 job myself.

I have very bad news to report, for which I am very sorry, but there is no way of avoiding it. It is just one of those bad breaks that come. Mr. Chisholm was delayed en route, and did not return today. Mr. Schultz leaves, according to schedule, for his vacation in Europe tonight—once more absolutely refusing to talk definitely without Mr. Chisholm here. I tried very hard to have him use wires, or telephone, but to no avail. He simply would not function without having a conference with Mr. Chisholm.

Not a thing can be done now until Mr. Schultz returns October 1st. Whether you can stall until then or not, I do not know, but hope that perhaps you may find it wise to try, because I am hopeful that an option at a reasonable price can be obtained when Mr. Schultz gets back.

With best regards.

Sincerely,

GEORGE

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\* Bears exhibit mark in previous litigation, and identified 4/3/40 as Ex. P-62 on depositions herein.

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**[Plaintiffs'] Exhibit P-98.\***  
(Received in evidence 10/29/40)

September 26th, 1928.

IN CONSIDERATION of \$1.00 receipt of which is hereby acknowledged, we the undersigned stockholders of the Houde Engineering Corporation, hereby give to Krauss & Company, for a period of thirty (30) days from the date hereof, the right to purchase all the stock of the Houde Engineering Corporation at a price of (\$4,000,000) Four Million Dollars in total. This option can only be exercised by the payment of cash before its expiration.

It is understood that the net assets of the Houde Engineering Corporation, when, as, and if this option shall be exercised will be at least equivalent to the position as set forth in its balance sheet dated August 31st, 1928, and any accrual in these net assets occurring since the close of business August 31st, 1928 shall adhere to the vendors in this option.

Inasmuch as Krauss and Company will act as a broker in this transaction, it is also understood that in the event of the sale of said stock being consummated, Krauss and Company will be entitled to a commission from the purchase price of 3%.

If stockholders owning not more than a total of 265 shares of said stock, who do not sign this option, refuse to join in the sale at the price aforesaid, there shall be a reduction made in the purchase price of \$1,640.19 per share for each share of said stock which the undersigned shall be unable to deliver to the purchasers.

It is understood that the name of A. B. Shultz is signed hereto in pursuance of verbal authority given by him to negotiate a sale of said stock.

A. B. SHULTZ,  
By G. H. Chisholm.

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\* Identified 4/3/40 as Ex. P-98 on depositions herein, and bears exhibit marks in previous litigation.

GEORGE H. CHISHOLM,  
*V.-Pres.*

HARRY L. CHISHOLM,  
*Treas.*

B. D. SHULTZ,  
*Secretary.*

J. N. SOULLY,  
*V. P. Director.*

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**[Defendants'] Exhibit P-99.\***

(Received in evidence 12/3/40)

September 26, 1928

IN CONSIDERATION of \$1.00, receipt of which is hereby acknowledged, we the undersigned stockholders of the Houde Engineering Corporation hereby give to Krauss & Company, for a period of thirty (30) days from the date hereof, the right to purchase all the stock of the Houde Engineering Corporation at a price of (\$4,000,000) Four Million Dollars in total. This option can only be exercised by the payment of cash before its expiration.

It is understood that the net assets of the Houde Engineering Corporation, when, as, and if this option shall be exercised will be at least equivalent to the position as set forth in its balance sheet dated August 31, 1928, and any accrual in these net assets occurring since the close of business August 31, 1928 shall adhere to the vendors in this option.

Inasmuch as Krauss and Company will act as a broker in this transaction, it is also understood that in the event of this option being exercised Krauss & Company will be entitled to a commission from the purchase price of 3%.

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.....  
.....  
.....

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\* Bears exhibit marks in previous litigation and identified 4/3/40 as Ex. P-99 on depositions herein.

**[Defendants'] Exhibit P-100.\***

(Received in evidence 12/3/40)

It is understood that the name of A. B. Shultz is signed  
 authority to negotiate a sale. ~~at said price~~  
 hereto in pursuance of verbal instructions ~~^ given by him~~  
 before leaving for Europe.

If stockholders owning not more than a total of 265 shares  
 of said stock, who do not sign this option, refuse to join  
 in the sale at the price aforesaid, there shall be a reduction  
 made in the purchase-price of \$1,640.19 per share for each  
 share of stock not delivered to the purchasers.

			yes	(?)
	A. B. S.	1,125	1,125	
	H. C.	300	300	
	G. C.	300	300	
	B D S	282 $\frac{1}{4}$ x	282 $\frac{1}{4}$	
131 $\frac{1}{4}$	J S	131 $\frac{1}{4}$	131 $\frac{1}{4}$	
131 $\frac{1}{4}$	F S	131 $\frac{1}{4}$		131 $\frac{1}{4}$
<hr/>				
262 $\frac{1}{2}$	H P	18 $\frac{1}{4}$ x		18 $\frac{1}{4}$
	McKaig	37 $\frac{1}{2}$		37 $\frac{1}{2}$
	Zw.	18 $\frac{1}{4}$ x		18 $\frac{1}{4}$
	H. Est.	37 $\frac{1}{2}$		37 $\frac{1}{2}$
2,176	S M S	37 $\frac{1}{2}$	37 $\frac{1}{2}$	37 $\frac{1}{2}$
262 $\frac{3}{4}$	Clair	20		20
<hr/>				
2,438 $\frac{3}{4}$		2,438 $\frac{3}{4}$	2,138 $\frac{1}{2}$	262 $\frac{3}{4}$
			2,176	
<hr/>				
B5696-W				
	2438 $\frac{3}{4}$	1125		
	2438.75	600		
	1590	281 $\frac{1}{4}$		
	<hr/>	131 $\frac{1}{4}$		
	21948750	37 $\frac{1}{2}$		
	1219375			
	243875	2175.	2438.75	
	<hr/>		2175	
	3,877,612.50			
			263	

\* Identified 4/3/40 as Ex. P-100 on depositions herein.

Statement that Bert's name is signed by verbal auth only  
Commission only in case sale is made

Statement that if cannot deliver shares of any Sk not  
signing there shall be a pro rata red in price.

2438.75) 4,000,000.00 (164.0-18  
2 438.75

1 561 250  
~~1 214 375~~

41 875  
1 463 250

98 000 0  
97 550 0

2438.75  
164.01

450 0000  
243 875

2 4 38.75  
9 75 5 00 0  
146 32 5 0  
24 3 87 5

206 1250  
2438.75  
164.01

39,9,97,9.38.75

24 38.75  
9755 00 0  
1 46325 0  
2 43875

3,99979.38 75

[Plaintiffs'] Exhibit P-101a.\*

(Received in evidence 10/29/40)

Buffalo, N. Y.

October 11, 1928.

Messrs. A. B. Shultz, George H. Chisholm,  
Harry Chisholm, B. Shultz and J. Scully:

Dear Sirs:

Referring to the option dated September 26, 1928, which  
you have given us for the purchase of all of the stock of

\* Carbon copy identified 4/4/40 as Ex. P-101 on depositions herein.

Houde Engineering Corporation at a price of \$4,000,000.00 we beg to advise you that we have secured as a purchaser the New York Car Wheel Company of this City, which has agreed to purchase said stock upon the terms of our option, and has made available in our hands the sum of \$4,000,000.00 therefor.

We accordingly notify you that we elect to exercise our option as of this date, and tender you payment in full upon delivery to us of all the stock of the Houde Engineering Corporation duly endorsed for transfer, less a possible maximum of 265 shares, all as provided in our option.

We shall be glad to suit your convenience as to time and place of delivery, and payment prior to October 25th, and suggest that you promptly arrange with us for an early closing.

Yours very truly,

KRAUSS & COMPANY  
By T. Cantwell

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**[Defendants'] Exhibit P-102a.\***

(Received in evidence 10/30/40)

September 28, 1928

A. B. Shultz  
Hotel Pierre Premier  
PARIS, FRANCE

Looks as if sale will go through if can take prompt action. Price Four Million cash for all stock. All others have agreed. Please cable me immediately authority to act for you and Clare. No need hastening your return.

G. H. CHISHOLM.

FULL RATE CABLE

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\* Identified 4/4/40 as Ex. 105A on depositions herein.

**[Defendants'] Exhibit P-104a.\***

(Received in evidence 10/30/40)

Postal Telegraph

Cable form

9/29 1928

To Paris

Cables received George Chisholm arrange telephone me  
Paris Louvre 07-91 Cable Pierre time of cable

Shultz

Recd

9 00

M.D.

W. F. Hennesy 79 Greenwood  
Dave Bid. 4325

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\* Identified 4/4/40 as Ex. P-104-A on depositions herein.

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**[Plaintiffs'] Exhibit P-105a.\***

(Received in evidence 10/28/40)

Postal Cablegram

A. B. Shultz

Hotel Pierre Premier

Paris France

Manufacturers Bank trying to get best price possible acting in our interests. Option four million cash minimum. Commission three percent. Believe can effect sale now under present financial and industrial conditions which may change. We are pessimistic if delay necessary. Purchaser would buy capital stock assuming all assets and liabilities August thirty first. Profits since come to us in addition. We feel future competition uncertain and all agree wise to take sure thing. Any or all present organization remain if wish. Purchaser's attitude hope they stay. Please cable

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\* Identified 4/4/40 as Ex. 105a on depositions herein.



authority to act for you and Clare. Am afraid may lose opportunity if wait your return. Prospects Timken Bendix third party unknown.

(s) G. H. CHISHOLM

**[Plaintiffs'] Exhibit P-106a.\***

(Received in evidence 10/30/40)

Message Memorandum

October 1 1928

To

POSTAL TELEGRAPH-CABLE COMPANY

For convenience in verifying accounts,  
please preserve the following items of  
messages sent.

To	137 WORD CABLE INCLUDING PC AND FIVE WORDS PC PREPAID CABLE TO A B SHULTZ PARIS CABLE ACKNOWLEDGMENT OF RECEIPT	\$ CTS.   \$ 35 37 1 35
From	G H CHISHOLM	
	Total,	\$ 36 72
(Signature)	Postal Tel Co. Per C. Mason	

\* Identified 4/4/40 as Ex. P-106A on depositions herein.

**[Plaintiffs'] Exhibit P-108.\***

(Received in evidence 10/29/40)

7NYMN 650 AM 15 VIA COML  
PARIS OCT 2 1928 1149AM

\* Identified 4/4/40 as Ex. P-108 on depositions herein.

GEORGE CHISHOLM ATLASTEEL

BUFFALO.

OPTION AS CABLED HAS OUR APPROVAL

OBVIH (leaving today for) SWITZERLAN

OJABEMEHUV (will return by Saturday)

HERE.

SHULTZ

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**[Plaintiffs'] Exhibit P-112.\***

(Received in evidence 11/5/40)

MEMORANDUM in RE HOUDE ENGINEERING CORPORATION.

On September 26th certain stockholders of the Houde Engineering Corporation gave an option to Krauss & Company to purchase their holdings of stock in the Houde Engineering Corporation; Krauss & Company, through Mr. Rea secured the New York Car Wheel Company as the purchaser of this stock.

It is the intention, and mutual understanding, of Messrs. Harriman, Rea, and Wurst, of the Manufacturers & Traders-Peoples Trust Company, and Mr. Fred B. Cooley, President of New York Car Wheel Company, that in the event of the death or disability of Mr. Cooley before the organization of a syndicate hereafter mentioned Messrs. Harriman, Rea, and Wurst, will take over the obligation of the New York Car Wheel Company to complete the purchase of the Houde Engineering Corporation stock, and hold it (The New York Car Wheel Company) harmless from all its obligations in that respect; and Mr. F. B. Cooley, as President of the New York Car Wheel Company agrees for that company, or its assigns, that in the event of his death or disability, that Messrs. Harriman, Rea, and Wurst, shall succeed to all the rights of the New York Car Wheel Company to purchase said stock.

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\*Bears exhibit marks in previous litigation as well as being identified on 4/4/40 as Ex. P-112 on depositions herein.

It is the intention of the New York Car Wheel Company presently to form a syndicate with the assistance of the officials of the Trust Company, above mentioned, to take over from it a substantial amount of the stock which the New York Car Wheel Company has elected to purchase under the Krauss & Company option; this amount to be taken over from the New York Car Wheel Company to relieve it of approximately the amount of \$3,500,000.00 of a total purchase of \$4,000,000.00.

It seems best not to form this syndicate for possibly three or four days from date, but the officials of the Trust Company have signified their ability and readiness to do so.

This memorandum is intended to set forth the intention of the parties to it, in the event of the death, or disability, of Mr. Fred B. Cooley, and prior to the formation of the Syndicate as stated above.

PERRY E. WURST  
LEWIS G. HARRIMAN  
GEORGE P. REA  
F. B. COOLEY

October 11, 1928

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**[Plaintiffs'] Exhibit P-113.\***  
(Received in Evidence 11/19/40)

Buffalo, N. Y.  
October 13, 1928.

Messrs. Lewis G. Harriman,  
Perry E. Wurst,  
George P. Rea.

Gentlemen:—

Through the agency of the Manufacturers and Traders-Peoples Trust Company, which held an option to purchase the stock of the Houde Engineering Corporation, the New York Car Wheel Company, of which I own control, has undertaken to purchase this stock at a price of approximately

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\* Identified 4/4/40 as Ex. P-113 on depositions herein.

\$4,000,000.00 in accordance with the terms of the option held in the name of Krauss and Company.

You individually, and personally, have undertaken to relieve the New York Car Wheel Company of this obligation to purchase, in case of my death, and you have also undertaken to refinance the Houde Engineering Corporation for me.

Negotiations are now pending for an immediate resale of the stock of this corporation at a profit; thus obviating the necessity of any refinancing, to a subsidiary of the General Motors Corporation. These negotiations were instituted by Mr. John R. Oshei, and if they are consummated it is my intention to pay Mr. Oshei a proper sum for his services, and after the other expenses are paid, it is my intention to divide the net profit as follows:

50% to the Manufacturers & Traders-People Trust Co.  
and Western New York Investors, Inc. jointly

7½% Mr. Harriman

7½% Mr. Wurst

15% Mr. Rea.

retaining 20% myself.

In case this sale is not consummated, it is contemplated that an underwriting syndicate be organized, in which we shall participate individually, in which the bank and Western New York Investors, Inc., will be permitted to participate; and also such other individuals, and corporations, as we shall agree upon, including—Central Trust Company of Illinois, and Eastman, Dillon and Company, who were originally interested in refinancing this corporation.

I expect such plan of refinancing to provide that 25% of the net profit shall be retained by me and you as my associates, to be divided among us on the following basis:

15% Mr. Harriman

15% Mr. Wurst

30% Mr. Rea

40% Myself

(signed) F. B. COOLEY.

**[Plaintiffs'] Exhibit P-116b.\***

(Received in Evidence 10/30/40)

Buffalo, N. Y., October 22nd, 1928.

RECEIVED OF B. D. SHULTZ

Certificate of stock representing One hundred (100) shares of the HOUDE ENGINEERING CORPORATION, endorsed in blank, to be delivered to New York Car Wheel Company or its nominee when at least all of the outstanding stock of said company, except two hundred sixty-five (265) shares, have been deposited with the undersigned depository. Delivery is to be made pursuant to the terms of an option, dated September 26, 1928, given to Krauss & Company. The price per share is to be at the rate of Four Million Dollars (\$4,000,000) for the entire issued and outstanding stock of said Houde Engineering Corporation, in addition to such sum per share as shall be certified to represent earnings since September 26th, 1928, as certified to the undersigned by Ernst & Ernst, less a commission of Three percent. (3%) which is to be retained by you and paid to Krauss & Co.

MANUFACTURERS &amp; TRADERS-PEOPLES TRUST COMPANY

By (s) Perry E. Wurst  
*Executive Vice President*

**Plaintiffs' Exhibit P-542.†**

(Received in Evidence 11/18/40)

October 24th, 1928.

RECEIVED of New York Car Wheel Company, by Fred B. Cooley, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00), part payment on a total of One Million Eight Hundred Eighty Four Thousand Ninety-one and 91/100 Dollars, (\$1,884,091.91), which is the full amount due me for One Thousand One Hundred Twenty-five (1,125) shares of

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\* Identified 4/4/40 as Ex. P-116B on depositions herein.

† Identified 11/18/40 as Ex. P-542 on the trial herein.

the Capital Stock of Houde Engineering Corporation, sold and delivered under the terms of an option dated September 26th, 1928, given to Krauss & Co., the three percent (3%) commission allotted to the latter having been deducted from the sale price. The balance is to be paid to me on demand, except that I may be permitted to take stock of a new corporation in part payment of the balance.

It is understood that I am repaying to Fred B. Cooley the sum of Fifty Thousand Dollars (\$50,000.00), being the amount paid by him to settle the claim of Francis P. Scully and James N. Scully against me.

(s) ALBERT B. SHULTZ

We undertake to see that payments are made to A. B. Shultz, in accordance with the terms of the above receipt, on demand.

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY  
By (s) Perry E. Wurst  
*Executive Vice President*

---

### Exhibit C to Complaints.\*

"October 24th, 1928.

RECEIVED of New York Car Wheel Company, by Fred B. Cooley, the sum of Two Hundred Nineteen Thousand Eight Hundred Ten and 73/100...Dollars, (\$219,810.73), in full payment for one hundred thirty-one and one-quarter (131 $\frac{1}{4}$ ) shares of the Capital Stock of Houde Engineering Corporation, sold and delivered under the terms of an option dated September 26, 1928, given to Krauss & Co., the three per cent (3%) commission allotted to the latter having been deducted from the sale price.

JAMES N. SCULLY.

---

\*This exhibit was received in evidence as defendants' Ex. P-130 on 10/30/40; it bears exhibit marks in previous litigation, and was identified 4/4/40 as Ex. P-130 on depositions herein. The answer of the Bank, Wurst, et al., admits that this exhibit is similar in form to the receipts signed by the other stockholders [1 51].

**[Defendants'] Exhibit D-4.\***  
(Received in evidence 11/1/40)

SYNDICATE AGREEMENT  
HOUDE ENGINEERING CORPORATION SYNDICATE  
November 1, 1928.

1. The Subscribers hereby associate themselves as, and shall constitute, a Syndicate for the purpose of buying from New York Car Wheel Company of Buffalo, N. Y., 2438- $\frac{3}{4}$  shares, being all of the outstanding capital stock of Houde Engineering Corporation at the cost of said stock to said New York Car Wheel Company, and for the purpose of supplying additional working capital to said Houde Engineering Corporation. Said cost shall consist of:

(a) The actual price paid by said New York Car Wheel Company for said stock, which is based on the total price of \$4,000,000.00 for all the outstanding stock of said Company, plus accruals from August 31st to October 11th, 1928.

(b) Interest, counsel fees, disbursements and all necessary and proper expenses of New York Car Wheel Company incurred in the purchase and carrying of said stock.

The New York Car Wheel Company has deferred its profit in the transaction as hereinafter provided.

2. The Subscribers shall participate pro rata in the Syndicate to the extent of the amounts set opposite their respective names, and agree to pay for subscriptions on call of the Syndicate Managers, as hereinafter provided. The Subscribers further agree, if the Syndicate Managers determine that the Houde Engineering Corporation, or its successor, requires additional working capital, to pay additional amounts pro rata, not exceeding twenty-five per cent (25%) of their respective subscriptions as and when called upon by the Syndicate Managers. All Participations are

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\* Identified 4/1/40 as Ex. D-4 on depositions herein. Exs. D-8, P-178/9 are copies or carbon copies of this exhibit, except for names of syndicate subscribers [v., I 494-5]

payable at the time and place designated in such call of the Syndicate Managers, and calls not paid on the date so fixed shall be charged with interest at the rate of six per cent (6%) per annum.

3. The Syndicate Managers will issue to the Subscribers Certificates of Participation in the Syndicate after payments are made. Certificates of Participation shall be in such form as the Syndicate Managers shall determine and may, in the discretion of the Syndicate Managers, be registered by such Trust Company as they may designate as Registrar of such Certificates.

4. Frederick B. Cooley, Lewis G. Harriman and  
are hereby constituted Syndicate Managers under this agreement. In the event of the death, permanent disability or resignation of any Syndicate Manager, his place shall be filled by the remaining Syndicate Managers; and upon the failure of the remaining Syndicate Managers to fill any such vacancy or vacancies within sixty (60) days after they occur, the majority in amount of participants may fill the same by written designation delivered to the Registrar, or to the holders of Certificates of Participations. Wherever the Syndicate Managers are referred to in this agreement it refers to the Syndicate Managers actually acting as such. The Syndicate Managers assume no personal obligation or liability in the management of the Syndicate and shall be liable only for their bad faith or wilful misconduct.

5. The Syndicate Managers shall be vested with entire and sole power to manage and conduct the Syndicate. Without limit upon the generality of the foregoing they shall have and exercise all of the rights and powers of the Syndicate as stockholders of Houde Engineering Corporation, or any successor or other corporation in which the Syndicate may own stock, to the full extent of all capital stock at any time purchased or owned by the Syndicate. To that end they shall have the right, if they shall deem it necessary or advisable, to cause all Syndicate stock of Houde



Engineering Corporation, or any successor or other Corporation, to be transferred to their names, but for the benefit of the Syndicate. For the purpose of more effectively vesting the specific powers above enumerated in the Syndicate Managers each of the Subscribers does hereby constitute the Syndicate Managers his or its true and lawful attorney, during the continuance of the Syndicate, in his or its name, place and stead, to vote all stock of Houde Engineering Corporation, or any successor or other Corporation which may have been purchased and/or owned by the Syndicate and distributed to the participants, as fully as he or it could do if personally present, hereby ratifying and confirming all acts or things done or performed by virtue hereof. The Syndicate Managers shall have the right to purchase, contract for the purchase, sell, repurchase and resell stock of Houde Engineering Corporation and of its successors; to borrow money for account of the Syndicate at such interest rates and upon such terms as they may determine; to pledge or otherwise charge as security for such borrowings, the assets of the Syndicate in whole or in part, including any unpaid obligations of the participants. The Syndicate Managers shall have the right to organize or cause to be organized, or to join with others in the organization of a Corporation under the laws of such State as they may determine, and to transfer to such Corporation all or any part of the Syndicate assets in exchange for cash and/or stock in such Corporation. The Syndicate Managers shall have the right to cancel and forfeit to the Syndicate, or to resell, any Participation upon failure of the participant to make payment of all of his Participation when called in accordance with this agreement, or upon the failure of any participant to perform any part of his obligation hereunder. Failure on the part of one participant to pay or to perform his obligation hereunder shall not relieve any other participant. The Syndicate Managers may employ such agents, counsel and others in whatever capacity as they may deem proper; all for

the account of the Syndicate and at its expense. The Syndicate Managers shall act without compensation.

6. The Syndicate is organized for the period of one year from its date, subject, however, to the right of the Syndicate Managers to extend the same for a further period or periods not exceeding one year from the expiration of said original term by ten days written notice to participants. The Syndicate Managers may, from time to time, distribute shares of stock and/or any profits from the Syndicate operation and the same shall be distributed pro rata to the participants.

7. The Syndicate Managers may terminate this Syndicate at any time upon ten (10) days' notice to the participants. Upon the expiration or termination of the Syndicate, and after the payment of all Syndicate obligations, the assets shall be distributed as follows:

Any assets other than cash, (including any assets theretofore distributed to participants) shall be appraised by the Syndicate Managers to determine the basis of the cost thereof to the Syndicate, in accordance with the Federal Income Tax Law and Regulations controlling such cost basis, for the purpose of determining the profit or loss resulting from the Syndicate operation. Twenty-five per cent (25%) of any net profit resulting from the Syndicate operation shall first be paid to New York Car Wheel Company, or its assigns, as its profit upon the sale of Houde Engineering Corporation stock to the Syndicate; such payment to be made partly in cash and partly in other assets (if any) at their value as appraised, in the proportion which total Syndicate cash bears to total Syndicate other assets at their value as so appraised (including any cash or other assets theretofore distributed to the participants); provided, however, that in determining the amount of profits for the purpose of arriving at the payment to New York Car Wheel Company, no account shall be taken of any sums paid in for additional working capital, and similarly no account shall be taken of the net earnings of the busi-

ness, whether distributed by way of dividends or not. All assets of the Syndicate remaining after such payment to New York Car Wheel Company shall be distributed pro rata to the participants in like proportions to each participant of cash and other assets, if any.

8. All expenses of the Syndicate Managers, including brokerage commissions, counsel fees and all other disbursements and expenses made by them in connection with the carrying out of the purpose of this agreement shall be charged to the Syndicate and shall be divided, borne and paid pro rata by the Syndicate Participants upon call of the Syndicate Managers. Nothing in this agreement shall be construed as constituting the Subscribers or Participants partners with each other, or with the Syndicate Managers, it being expressly agreed that the liability of each Subscriber or Participant is limited to the amount of his Participation, the amount of any call for additional working capital not exceeding twenty-five per cent (25%) of his Participation, and his pro rata share of the expenses of the Syndicate.

9. The Syndicate Managers may be subscribers to the Syndicate and to the extent of any subscription shall participate in the profits and losses to the same extent as other Subscribers.

10. All calls and notices upon or to participants shall be made or given by the Syndicate Managers, or their agents or nominees, and shall be sufficient if mailed, registered, to the participants at their addresses of record with the Syndicate Managers or the Registrar of the Certificates.

11. This agreement shall bind the Subscribers and their respective successors, assigns and personal representatives. It may be made or signed in several counter-parts, but all such counter-parts shall be taken as one original instrument. The holding of Certificates of Participation shall constitute such holders parties to the agreement as fully to all intents and purposes as if signing the same.

IN WITNESS WHEREOF, the Syndicate Managers have subscribed an original hereof and the Syndicate Subscribers have subscribed said original or counterparts thereof, as of the day and year first above written.

.....  
 .....  
 .....

## SYNDICATE SUBSCRIBERS

<i>Name</i>	<i>Address</i>	<i>Amount of Subscription</i>
Lewis G. Harriman	% M and T-Peoples Trust Co.	\$250,000
Perry E. Wurst	"	250,000.
Harry T. Ramsdell		250,000 —
Ralph Hochstetter		500,000.—
E. C. Andrews		250,000 —
Albert D. Sykes		50 000
D. J. Kenefick		50,000.
Bradley Goodyear		50,000
Eugene J. McCarthy		50,000
A. B. Shultz		250,000.00
F. B. Cooley		500,000.00

[Defendants'] Exhibit P-140.\*

(Received in evidence 11/27/40)

Buffalo, N. Y.

December 6th, 1928.

RECEIVED OF FRED B. COOLEY, the sum of One Million Six Hundred Thirty-four Thousand Ninety-one and 91/100 Dollars, (\$1,634,091.91) together with interest thereon at four percent (4%) from October 24th to December 1st, amounting to Six Thousand Seven Hundred Seventeen and 93/100 Dollars (\$6,717.93), being the balance

\* Identified 4/4/40 as Ex. P-140 on depositions herein.

in full due me on account of the purchase price of my stock in Houde Engineering Corporation.

These payments were received by me through the deposit of Two Hundred Thousand Dollars (\$200,000) to my account in the Manufacturers & Traders-Peoples Trust Company on December 3, 1928; the deposit of Six Thousand Seven Hundred Seventeen and 93/100 (\$6,717.93), made to my account on December 5, 1928; and the issuance to me by the Manufacturers & Traders-People Trust Company of two (2) Certificates of Deposit for Five Hundred Thousand Dollars (\$500,000) each, four (4) Certificates of Deposit for One Hundred Thousand Dollars (\$100,000) each, and one (1) Certificate of Deposit for Thirty-Four Thousand Ninety-one and 91/100 Dollars (\$34,091.91), all dated December 5th, 1928 and bearing interest from December 1st, 1928 on full calendar months only, at the rate of 2% per annum if left one month, 3% per annum if left two months and 4% per annum if left three months, which deposits and certificates were all made and issued in accordance with my instructions to Mr. Wurst.

A. B. SHULTZ.

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[Defendants'] Exhibit P-141.\*

(Received in evidence 11/27/40)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY  
Buffalo, N. Y.

December  
6th, 1928.

Mr. A. B. Shultz,  
537 East Delavan Avenue,  
Buffalo, N. Y.

Dear Mr. Shultz:

Below you will find a statement covering the sale of your 1125 shares of stock to Fred B. Cooley:

---

\* A carbon copy was identified 4/4/40 as Ex. P-141 on depositions herein.

*Oct. 24, 1928*

Delivered 1125 shares Houde Engineering  
stock, after deduction of commission, at ....\$1,884,091.91  
Payment made to you on account purchase  
price ..... 250,000.00

Balance due you as of this date.....\$1,634,091.91

*Dec. 1, 1928*

Interest on \$1,634,091.91 from October 24th to  
December 1st, 1928, 1 month 7 days, at 4%.. 6,717.93

\$1,640,809.84

The above sum was paid to you as follows:

Deposited to your checking a/c  
Dec. 3rd .....\$ 200,000.00

Deposited to your checking a/c  
Dec. 5th ..... 6,717.93

Certificates of Deposit issued  
Dec. 5th, 1928, in your name as  
follows:

2 at \$500,000 each..\$1,000,000.00

4 at 100,000 each.. 400,000.00

1 at 34,091.91 ... 34,091.91

(Above Certificates bear interest  
from Dec. 1, 1928)

1,434,091.91 \$1,640,809.84

Enclosed herewith is a copy of the receipt you gave me  
covering the above payments to you.

Very truly yours,

PERRY E. WURST.



SEP 16 1942

CHARLES ELMORE CROPLEY  
CLERK

19  
No. 404

# United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

---

WYATT D. SHULTZ, and One, as Co-Executors under the  
Last Will of Albert B. Shultz, Deceased,  
*Plaintiffs-Appellants,*

against

MANUFACTURERS & TRADERS TRUST COMPANY,  
Individually and as their Co-Executor, etc., *et al.*,  
*Defendants-Appellees.*

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Pl. Ex. P-226 (Id.)—Carbon of unexecuted agree- ment between stockholders of Houde Company and the defendant Bank, dated Feb. , 1928. This is the same as Plaintiffs' Ex. P-294 (an- other carbon from lawyer's files) in evidence and Plaintiffs' Ex. P-456 for identification, the latter being original from files of Eastman, Dil- lon & Co. (See stipulation at 2393) .....	2406
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- Pl. Ex. P-228 (Id.)—Draft financial circular covering proposed issuance of 70,000 shares of convertible Class A stock of Houde containing the typewritten signature of Eastman, Dillon & Co. 2410
- Pl. Ex. P-229 (Id.)—This exhibit is the original of which Plaintiffs' Ex. P-339 is a copy, so far as the latter exhibit contains typewritten matter. Upon the depositions four sheets of yellow paper clipped to Plaintiffs' Exhibit P-229 were marked Plaintiffs' Exs. P-229A, P-229B, P-229C and P-229D, respectively, (See 4489-90) ..... 2412a
- Pl. Ex. P-234—Statistical table relating to issuance of 50,000 shares of stock at 20 and 45,000 shares of stock at 21, (Plaintiff's Ex. P-417b from the files of Eastman, Dillon & Co. is a carbon copy of P-234). Received in evidence at Fol. 3082 (and see stipulation at 6319-20).. 2413
- Dfts. Ex. P-240—Memorandum in handwriting of Rea. Received in evidence at Fol. 4232 ... 2800
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Pl. Ex. P-269a/h (Id.)—Daily statements of the defendant Bank covering various dates in October and November, 1928. These exhibits are erroneously referred to in the record as Plaintiffs' Exs. P-169a/h. (See statement at 662-6)	2415
Pl. Ex. P-270—Proposed financial circular covering issuance of 100,000 shares Houde Engineering Corp. Class A Participating stock, dated March 24, 1928. (Received in evidence at Fol. 4100 .....	2416

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Pl. Ex. P-291 (id.)—Letter Parker to Sawyer, dated March 2, 1928 ..... 2433

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Pl. Ex. P-580—Typewritten copy of article appearing in Buffalo Evening News, dated Oct. 26, 1928. Received in evidence at Fol. 5553 .....	2597
Pl. Ex. P-581—Page 145 of the personal account book of the defendant Cooley. (Other pages from this same book were received in evidence as Plaintiffs' Exhibits P-363a/d and Defendants' Exhibit P-363e.) Received in evidence at Fols. 5720-1 .....	2598
Pl. Ex. P-582—Page 146 of the personal account book of defendant Cooley. (See Plaintiffs' Exhibit P-581, <i>supra</i> .) Received in evidence at Fols. 5720-1 .....	2598
Pl. Ex. P-583—Exemplified photostat of petition of defendant Wurst to the U. S. Board of Tax Appeals, verified Apr. 11, 1931. Received in evidence at Fol. 5899 .....	2599
Pl. Ex. P-591—Daily statement of condition of defendant Bank dated Oct. 25, 1928. Received in evidence at Fol. 6652 .....	2601
Pl. Ex. P-592—Subpoena <i>duces tecum</i> , dated Mar. 28, 1940, directed to Louis L. Babcock, with affidavit, upon which it issued. Received in evidence at Fol. 6772 (and see 524-6, 6770-71 and 6959) .....	2602
Plaintiffs' Exhibits (unnumbered received in evidence at Fol. 6661) consisting of minutes of Executive Committee of defendant Bank's Board of Directors for following dates:	
Oct. 17, 1928 .....	2861
Oct. 24, 1928 .....	2862
Dec. 5, 1928 .....	2875
Dec. 12, 1928 .....	2877

